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IN THE

Supreme Court of the United States

October Term, 1962.

GUSTAVE B. GARFIELD,

Petitioner,

against

EDMUND PALMIERI,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1962

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner Gustave B. Garfield, an attorney at law, in good standing for 39 years, admitted to the bar of the State of New York in 1923, to the United States District Court for the Southern District of New York in 1924, to the Supreme Court of the United States in 1939, to the United States Court of Appeals, Second Circuit in 1943, and against whom no charge has ever been made in any said court at any time, respectfully petitions this Court for a writ of certiorari, for the review of a judgment entered in United States Court of Appeals, Second Circuit, on January 5, 1962, which affirmed the judgment of the United States District Court for the Southern District of New York (James Van Pelt Bryan, U.S.D.J.) granting summary judgment dismissing the plaintiff's complaint in an action for libel brought against United States District Judge Edmund Palmieri.

(a) Opinions below.

The opinion of U. S. District Judge Bryan below is reported in the publication of the West Publishing Company known as 193 Fed. Supp. 137 and is set forth at length at pages 10(a) to pages 22(a) of the Appendix to the Appellant's Brief.

The opinion of the United States Court of Appeals for the Second Circuit is set forth in the Appendix to the petition and is reported in 297 Fed. 2d 526.

(b) A concise statement of the grounds on which the jurisdiction of this Court is invoked.

(i) The judgment sought to be reviewed was entered in the office of the Clerk of the United States Court of Appeals, Second Circuit, on January 5, 1962.

(ii) No application for rehearing was made in the United States Court of Appeals.

(iii) The jurisdiction of this Court is predicated upon Section 2101(c) of Title 28 of the United States Code.

(c) The questions presented for review.

1. Is a United States District Judge entitled to immunity from suit for money damages for the *re*publication by him of a libelous opinion in a publication of a private publishing company such as West Publishing Company's Federal Supplement, seven months after he had filed his written opinion with the Clerk of the United States District Court, and at a time when he had ceased having any official connection with the litigation in which the libelous opinion originated?

2. Should the rule of law applicable to Congressmen and Senators which casts them in damages when they

republish their privileged, slanderous or libelous utterances after they have been published in the arena of privilege be held to be applicable as well to United States Judges who republish their libelous opinions privately after they have been filed with the Clerk of Court and long after they have ceased having any official connection with the litigation out of which the opinion originated, or should United States District Judges be held to be a class apart?

3. In an action to recover damages for libel brought in the Supreme Court of the State of New York by a New York lawyer against a United States District Judge for the Southern District of New York, for the republication in New York and elsewhere of a malicious opinion after the matter was no longer *sub judice* should the New York law which casts the offending judge in damages as embodied in the case of *Murray v. Brancato*, 290 N. Y. 52, control the decision of the United States District Court, where the action was removed to the federal courts only because it was asserted that the District Judge was acting under color of his office (§ 1442, Title 28, U. S. Code)?

4. In the absence of Congressional mandate requiring the opinions of the District Courts and Court of Appeals to be printed may the District Court and the Court of Appeals set up a virtual copyright monopoly in West Publishing Company so as to include republication of opinions of said courts in West Publishing Company's publications, as has been done in this case, in the face of the decision of this Court in *Wheaton v. Peters*, 8 Pet. 591 (1834), which holds that no such copyright monopoly may granted to any reporter.

5. Granted that a Judge of the United States District Court has immunity from suit under federal law for civil liability for statements made by him in an opinion

written by him regardless of how violent the libelous utterances may be, does it also follow that long after the matter is *sub judice* that the federal Judge is privileged in transmitting said opinion to West Publishing Company as being within the perimeter marking the outlines of the absolute privilege of a federal Judge against civil liability?

6. If the perimeter marking the outlines of privilege is by the process of "judicial notice" to be expanded to include West Publishing Company, a private agency, having no official sanction, why not open the entire area of the press to the republication of libelous opinions of United States Judges?

(d) Statutes which the case involves.

The sole provision to be found in the United States Code with respect to the availability of opinions of the United States District Judges to the public is to be found in §753, Title 28, U. S. Code as follows:

> §753 *Reporters*
>
> (b) * * * The original notes or *other original records* and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

The sole provisions for the printing and distribution of the opinions of any United States Courts are to be found in Sections 411 to 415 of Title 28, United States Code. These provisions are applicable to the Supreme Court of the United States and the United States Court of Claims which are printed by the Public Printer. Congress has made no provision for the printing or publication of opinions of District Judges.

There is a provision in Section 303 of Title 5 of the U. S. Code for the rendition of opinions by the Attorney General at the request of any executive department head and for the printing and distribution of said opinions (Section 304).

Section 1442 of Title 28, U. S. Code provides for the removal of an action from the state courts to the United States District Court when a Federal officer is sued or prosecuted.

> §1442—*Federal officers sued or prosecuted*
>
> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending: * * *
>
> (3) Any officer of the courts of the United States for any act under color of office or in the performance of his duties.

(c) A concise statement of the case containing the facts material to the consideration of the questions presented.

On December 30, 1960, the plaintiff, Gustave B. Garfield, an attorney at law, commenced an action for libel in the Supreme Court of the State of New York, County of New York, against the defendant, Edmund Palmieri, a Judge of the United States District Court, seeking money damages (App. p. 3a).

The complaint alleged that plaintiff has been admitted to practice as an attorney since July 25, 1923, and is in good standing and that no charges had ever been filed against him at any time nor has he ever been censured, suspended or disbarred on any charges ever filed against him (App. p. 30a). The complaint charged that in the

month of January, 1960, the defendant, Judge Palmieri, while no matter was then pending before him and no matter was then *sub judice*, acting in his private capacity as a citizen, and not in his judicial capacity (App. p. 31a), caused to be published in 180 Federal Supplement (a private publication of the West Publishing Company) a libelous statement of and concerning the plaintiff in which defendant asserted that the plaintiff had been rebuked by the United States Court of Appeals, Second Circuit, for unworthy conduct as an attorney in an opinion of said Court filed in the case of *Fleischer v. Phillips*, 264 F. 2d 515 (App. p. 31a). It is further alleged that the defendant authored the said libelous opinion on July 15, 1959 (the extract containing the libel is annexed to the complaint as Exhibit "A," Appendix, pp. 33a-34a), and caused the same to be filed on that day in the office of the Clerk of the United States District Court for the Southern District of New York, but that at the time of the procurement of the publication thereof in January, 1960, defendant did not have under his jurisdiction any further matter or proceeding in the case of *Fleischer v. A. A. P., Inc., et al.*, in which said libelous matter was uttered, nor was said case assigned generally or specifically to the said defendant at the time of the publication of said Volume 180 Federal Supplement.

The case was removed to the United States District Court for the Southern District of New York on January 23, 1961, pursuant to Title 28 U. S. C., §1442, on the ground that the defendant was acting under *color of his office* as United States District Judge.

A motion was made to dismiss the complaint under Rule 12 (b) (6) F. R. C. P., but it was made on the affidavit of one Stephen Kurzman, an assistant United States attorney, who asserted that the defendant enjoyed judicial immunity for the foregoing libelous statement, even

though the act complained of was done when the defendant was not sitting in the seat of judgment and no matter was then *sub judice* before him. Mr. Kurzman further annexed to his affidavit a letter, written on February 8, 1960, by the West Publishing Company to Judge Palmieri, in which West requested defendant to send them a copy of the opinion, with the names and addresses of the attorneys for the respective parties (App. p. 9a). Mr. Kurzman further asserted that, "It is precisly for such reason that publication of federal court opinions in the West system is a necessity for the proper administration of justice" (App. p. 7a) No affidavit was submitted by Palmieri, J.

Judge Bryan, before whom the motion to dismiss was argued, granted summary judgment dismissing the complaint on the grounds asserted by Mr. Kurzman, holding that the case was not to be determined by New York law as laid down by the New York Court of Appeals in the case of *Murray v. Brancato*, 290 N. Y. 52, but was to be decided by federal law, which he asserts gave Judge Palmieri judicial immunity even though the defendant was not sitting in the seat of judgment when he caused the libelous matter to be republished and had no matter *sub judice* before him (see opinion of Bryan, J., pp. 19a-22a).

Judge Bryan further held "the majority court (in *Murray v. Brancato*) does not seem to me to have reached the correct result. As I see it, the dissenting opinion upholding the absolute privilege under the circumstances presented is the sounder view" (App. p. 22a). Judge Bryan further held that New York law was not applicable and that under federal law Judge Palmieri enjoyed absolute immunity, basing his decision on the case of *Barr v. Matteo*, 360 U. S. 564; that the opinion was a public record when it was filed by Judge Palmieri

in July 15, 1959, and that "'In sending the opinion to West at its request, Judge Palmieri was, in any event, doing no more than the Clerk of this court would have been required to do had West made the request to him" (App. p. 19a). "When a Judge sends an opinion to West Publishing Company for publication in the Federal Supplement he is performing one of the functions of his office as a federal judge which is well within the scope of his powers. I hold that the act of Judge Palmieri in sending his opinion to West at its request is as absolutely privileged against civil liability as are the acts of rendering and filing the opinion. The absolute privilege applies even if it were possible for Garfield to establish his allegations of falsity, malice and intent to do injury to him" (App. p. 20a).

The New York law is set forth in the majority opinion of Judge Lehman of the Court of Appeals in *Murray v. Braucato*, 290 N. Y. 52, and the pertinent portions of said opinion which hold that a Judge is not granted absolute immunity for causing a libelous opinion to be transmitted to the West Publishing Company for publication, are as follows:

> "Citing with approval the opinion of Chancellor Kent, the Supreme Court of the United States in *Bradley v. Fisher* (13 Wall. 335, 351) formulated the applicable rule. 'Judges of courts of superior or general jurisdiction are not liable to civil actions for their *judicial acts*, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter.' (Italics throughout this opinion are ours.) The rule of principle of exemption has been stated in many opinions and in many forms, but 'It is to be seen that in these different modes of stating the principle, there abides a qualification. To be free from liability

for the act, it must have been done as judge, in his judicial capacity; *it must have been a judicial act.* So it always remains to be determined, when is an act done as judge, in a judicial capacity? And this is the difficulty which has most often been found in the use of this rule, and which is present here; to determine when the facts exist which call into play that qualification. For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there." (*Lange v. Benedict*, 73 N. Y. 12, 25, 26.)

"No case has been cited to us where exemption from liability was claimed by a judge for any act done or words spoken or written when the judge was not actually sitting 'in the seat of justice,' i. e., in connection with a matter then *sub judice*. * * * He (plaintiff) seeks damages for the alleged *malicious publication of the opinions after the matter was no longer sub judice*. The problem presented upon this appeal is only whether the complaint alleges causes of action for such publication. * * * (56) The plaintiff here seeks to hold the defendant for the publication of an opinion in *unofficial* reports and concededly the law placed upon the defendant no duty in connection with such publication. (57)

"We are asked to take judicial notice that the New York Law Journal and the New York Supplement, though not official reports, are recognized legal publications, and that 'opinions in the New York Supplement are continuously cited both by judges and attorneys in opinions, decisions, and briefs.' Even though that be true, a judge has no official duty in connection with any publication of opinions except in the official reports. The publication of an opinion begins when the judicial decision is complete, and though in some degree connected with the exercise of a judicial function, since the law imposes upon the judge no duty to publish opinions in unofficial reports, acts connected with

such publication are not performed by the judge in his judicial capacity. The judge's rights and duties there are the same as those of any private person and if he chooses to act he must be held liable like any other person for damages resulting from a wrongful act *maliciously performed with intent to injure another*, unless the courts on grounds of public policy extend into neighboring fields the immunity from liability created by law for the protection of judges when acting within the field of their official functions and duties. No imperative public policy pointing to such extension is contained in any statute and we discern none in any judicial decisions. Only by judicial legislation beyond the legitimate power of the courts could such extension be made; nor can we see any reason for extending the immunity to publications in the New York Law Journal and the New York Supplement and excluding from the extended field of immunity publications in Law Reviews, or even in popular magazines or in the daily press. Such differences may be relevant in deciding whether the publication was made with actual malice and with intent to injure the person defamed by the publication—it is difficult to see in such differences a guide by which the court could draw a new line separating absolute judicial immunity from the qualified common law privilege in which all persons share. (58) * * Except where the Legislature may perhaps have extended the absolute immunity of judges or legislators or may perhaps have conferred absolute immunity upon persons publishing true and correct accounts of judicial or legislative proceedings the publication of judicial and legislative proceedings in unofficial reports is privileged only if made in good faith and from proper motives. Odgers, *op. cit.* pp. 252, 265; Newell, *op. cit.* Sections 450, 460a; Evans, 'Legal Immunity for Defamation,' 22 Minn. L. Review (1940) 607, 610; Prosser on Torts (1941), 844-851. * * * The defendant has pleaded only his absolute immunity from liability for any acts done

in his judicial capacity, and the courts below considered no other defense. In no event could the statute confer immunity for publications outside the State, and though we may presume that in Minnesota, where the New York Supplement is published, the common law rule exists which denies to an aggrieved person a right of action without proof of actual malice there is no allegation or proof that absolute immunity has been conferred by any statute there." (59)

Petitioner contends that the New York law is to be applied in this case under the decision of this court in *Klaxon v. Stentor*, 313 U. S. 496, 498, where the Court said:

> "Subject only to review by this court on any federal question that may arise, Delaware is free to determine whether a given matter is governed by the law of the forum or some other law. Cf. *Milwaukee County v. White Co.*, 296 U. S. 268, 272. This court's views are not the decisive factor in determining the applicable conflicts rule. Cf. *Funkhouser v. J. B. Preston*, 290 U. S. 163, and the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be."

The United States Court of Appeals, Second Circuit in a *per curiam* opinion in affirming Judge Bryan's order, held in pertinent part as follows:

> "The claim urged below that New York law as set forth in the decision of the New York Court of Appeals in *Marrash v. Brancato*, 290 N. Y. 52, 48 N. E. 2d 257, 146 A. L. R. 906, is determinative continues to be advanced by appellant on appeal. We find *Marrash v. Brancato* inapplicable. We concur with the judge below that federal law governs, and that under federal law a federal judge is protected by an absolute privilege against civil liability for statements made by him in an opinion written by him. We also hold, with the

> judge below, that Judge Palmieri's transmission to West Publishing Company, in compliance with West's request, of a copy of his written opinion previously filed in the office of the Clerk of his Court was within the perimeter marking the outlines of absolute privilege of federal judges against civil liability, an immunity recognized for years as necessary in order that federal judges may act fearlessly in performing their vital responsibilities that include duties in the administration of justice as well as in the deciding of cases. Bar and Bench alike rely upon the West Reporter volumes as sources in which to find the decisions of the U. S. Courts of Appeals and the U. S. District Courts; and we take judicial notice that an opinion of a federal circuit or district judge is considered 'not reported' until it appears in Federal Reporter or Federal Supplement."

The appellee would sacrifice the reputation of the plaintiff on the altar of the doctrine of *stare decisis*. He asserted below that "A system of jurisprudence based on the principle of *stare decisis* requires for its vigor that decisions be readily available for the guidance of courts and litigants" * * * "The public good which is served by the widest possible circulation of the common law is paramount to the interest of granting compensation to those who may, on rare occasions, feel themselves aggrieved by language in an adverse opinion."

The late Judge Jerome Frank of blessed memory said of the doctrine of *stare decisis* (Courts on Trial, pages 266-267):

> "the doctrine of precedents, sometimes * * * labelled by the latin words *stare decisis* * * * come from the latin maxim, *stare decisis et non quieta movere*. * * *
>
> "In sum the doctrine of *stare decisis* seems to mean that certainty outweighs justice: Let certainty be achieved though injustice be done and the heavens fall."

But there is no *duty* imposed upon a United States District Judge pursuant to request or voluntarily to transmit to a private publishing company any of his opinions. His *duty* is completed when he transmits his said opinion to the Clerk of the District Court, and there his *duty* ends. What the Judge does after that to procure *re*publication is a voluntary act, in most instances compelled by vanity, which, however justified in the particular case, furnishes no excuse for libel (*McGoorty v. Mart*z, 187 F. Supp. 343).

There is no contract for the publication of opinions of the District Courts between the Judges or the Courts on the one hand and West Publishing Company on the other as there was in the case of *Bradford v. Pette*, 204 Misc. 318; cited by the respondent below; for the New York Law Journal where the offending opinion was published in *Bradford* was the official publication of opinions pursuant to contract in the First and Second Departments of the Appellate Division and Justice Pette did no more than to send his opinion to the Clerk of the Court who caused it to be published. In exculpating Justice Pette from liability for the publication of the libel it was held:

> "Even if the procedure by which the publication was accomplished were to be held equivalent to causing such publication to be made, the defendant is not liable, for such publication constituted an integral part of the administration of justice in the Supreme Court Queens County. It was an *official judicial act*, performed in accordance with a subsisting contract entered into by the Justices of the Appellate Division of the Supreme Court in the Second Judicial Department and the New York Law Journal Publishing Company, the owner and publisher of the New York Law Journal (Defendant's Exhibit "7")."

Therein lies the crux of this case. Was the act of the appellee in sending and transmitting to West Publishing

Company, a copy of his opinion for republication, an *official judicial act?* Certainly it was not for the following reasons.

(1) There was no contract with anyone for the republication in West's Federal Supplement or any United States District Court opinions or any other opinions. It is true that West or anyone else might have obtained copies of the opinion from the Clerk of the District Court by paying his fees or costs of reproduction or by merely copying the opinion itself. But as asserted in *Bradford v. Pitte*, the New York Statute granting immunity for publication of true reports of judicial proceedings "*does not confer immunity for a publication which is made, that is, first given to the public, outside the state. (Murray v. Bramcato, supra, p. 59.)*" Since Federal Supplement is first published in St. Paul, Minnesota, the fact that West may have itself copied the opinion in the Clerk's office furnishes no basis for granting immunity to the appellee for his libelous republication by West of his offending opinion.

(2) In *Howard v. Lyons*, 360 U. S. 593, the defendant Lyons proved through his commanding officer that in transmitting his report to the Congressional members from Massachusetts he acted within and upon the specific orders of said commanding officer and merely performed his official duties. As this was a case in which the District Court obtained jurisdiction by reason of diversity of citizenship, had there been no supervening Federal Law granting exemption where the federal employee was *merely doing his duty*, the defendant would assuredly have been held liable under the Massachusetts libel laws.

(3) The custom which Judge Bryan *sua sponte* has found to exist among the Judges of the United States District Court for the Southern District of New York of transmitting their opinions to West Publishing Company cannot excuse the transmission to West or to anyone

else of libelous opinion. In the case of *Fuller v. Robinson*, 86 N. Y. 306, the Court of Appeals per Andrews, J., said:

> "Evidence of a usage or custom of trade is frequently admitted to annex unexpressed incidents to contracts, or to explain ambiguous and doubtful phrases in written agreements. But *reasonableness is one of the requisites of a valid usage, and an unreasonable or doubtful custom cannot be set up to affect the legal rights of parties.* Evidence of the custom of a particular trade is admitted to supply what is not expressed or to explain what is doubtful, upon the presumption that persons engaged therein are acquainted with and understand and tacitly assent that their contracts shall be interpreted in the light of the recognized usages. But *there is no ground for this presumption where the usage attempted to be shown is repugnant to common sense, or is based upon a disregard of the relations which exist between men, or the duties which in law and morals they owe to each other.*"

See

Pierpont, U. S., 7 Wall. 666, 19 L. Ed. 169;
United States v. The Reindeer, 27 Fed. Cases No. 16,145;
United States v. The Forrester, 25 Fed. Cases No. 15,132.

There is absolutely no provision of law requiring a United States District Judge to distribute his opinions either to the public printer, the Superintendent of Documents or to any private agency or printer. The sole provision for the Distribution of Reports and Digests is contained in Title 28 U. S. Code, Chapter 19, Sections 411 to 415 inclusive. Provision is therein made for publication and sale of the United States Supreme Court decisions by the Superintendent of Documents and for the distribution of Court of Claims decisions to various department heads. The latter are printed by the U. S. Government printing office and sold as public documents. Significantly United States District Courts are omitted.

If it were the purpose and intent of the United States Government to publish and distribute the opinions and decisions of United States District Judges, that would be a legislative act. "If a court attempted to enact a statute, it would be acting in violation of the Constitution" (Jerome Frank-Courts on Trial, p. 262). Accepting custom as a basis for exemption of liability for the transmission of an opinion to a private agency for republication is "judicial legislation beyond the legitimate power of the courts" (*Murray v. Brancato*, 290 N. Y. 52, 57).

(5) As there is no federal law which provides for the transmission by United States District Judges of their opinions to private or public agencies (except to the Clerks of the District Courts), the act of transmission must be held to be the republication of an opinion after the matter is no longer *sub judice*. In the instant case upwards of seven months transpired between the filing of the opinion with the Clerk and transmission to West. A prior republication had been made in the Findex system but with the offending language carefully omitted. (See *Fleischer v. A. A. P., Inc.*, 2 F. R. Service 2d, 12f. 21, p. 110, published by Callaghan & Co.) Is West Publishing Company to be singled out as a preferred child of the courts entitled, at mere request, to receive copies of opinions of United States District Judges and all other publishers excluded? Or is the immunity sought to be established to spread to all publications everywhere? Why stop at West? The answer was furnished by the Supreme Court in *Wheaton v. Peters*, 8 Pet. 591 (1834); where McLean, J., said:

> *"It may be proper to remark that the court are unanimously of the opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."*

(6) As in the case of *Murray v. Brancato*, 290 N. Y. page 55, *"The only question presented upon this appeal is whether the publication of which the plaintiff complains was 'in the exercise of a judicial function' for which the law gives complete immunity to the judge even if he acted maliciously and with actual intent to injure the plaintiff."* If this case is to be determined by the law of the State of New York then the answer must be as it was in *Murray v. Brancato*, that immunity is not granted to the appellee since his function as a judge ended with the filing of his opinion with the Clerk of the Court. That New York law applies must appear to a certainty because the case commenced in New York courts and was removed to the United States Court because appellee acted under color of office, and not necessarily in the performance of his duties, unless this court determine that it was the official duty of the appellee to transmit his offending opinion to West as the official reservoir of all District Court opinions. Certainly *Wheaton v. Peters, supra*, negatives the right of the District Judges to create any such monopoly in a single reporter to the exclusion of all other reporters. To single out West as the reservoir of all judicial opinions in the Southern District of New York, is to grant a forbidden monopoly to them.

(7) The exemption from liability which has been afforded to the appellee, by District Judge Bryan and the U. S. Court of Appeals, is self-created. It is not contained in any prior decision of any court of the United States and indeed the contrary has been held in the case of *Meiorern v. Martz*, 182 F. Supp. 343, where Judge Youngdahl applied the rule enunciated in *Murray v. Brancato, supra*, to the liability of a Congressman who republishes and circulates a copy of the Congressional Record to his constituents or to any third parties. There it has been held that only a qualified privilege applies: Judge Youngdahl said:

"But what of *republication*? Should an absolute privilege exist to bar suits for defamation resulting from a Congressman's circulation of reprints or copies of the Congressional Record to non-congressmen? The reason for the rule—complete and uninhibited discussion among legislators—is not here served. Accordingly the absolute privilege to inform a fellow legislator (either by way of speech on the floor or writings inserted in the Record) becomes a qualified privilege. 'Though a member of Congress is not responsible but of Congress for words spoken there, though libellous upon individuals, yet if he causes his speech to be published he may be punished as for a libel by action or indictment. This is the English and just law' [citing *Rex v. Abingdon*, 1 Esp. 276, Peake 310 (1794); *Rex v. Creevy*, 3 Eq. N. P. cases 228, 1 M & S 273 (1813)]; 1 Kent's commentaries 249, note c (8th Ed.) (Footnote 13 'and see *White v. Nichols*, 1845, 3 How. 266, 44 U. S. 266, 267').

"* * * *When analogy to the judicial privilege is made, it further appears reasonable to hold that Congressmen have only a qualified privilege, and thus are liable for malicious defamation, for unofficial dissemination of the Congressional Record. While a judge has an absolute privilege for the official publication of a judicial statement (as by reading an opinion in open court or filing it in the clerk's office) there is only a qualified privilege for the unofficial circulation of a defamatory opinion. Murray v. Brancato*, 1943, 290 N. Y. 52; annotation 1943 A. L. R. 913; *Francis v. Branson*, 1933, 168 Okla. 24, 31 Pac. 2d 870; Note 12, *Ford Law Review*, 193 (1943)." (Italics supplied.)

In the case of *Long v. Ansell* (1934), 63 App. D. C. 68, 69 F. 2d 386, affirmed 293 U. S. 76, the defendant Senator Long appealed from an order denying his motion to quash service in a suit which charged that the Senator had defamed plaintiff by circulating copies of the Congressional Record libellous of plaintiff.

In affirming the denial of the motion to quash service of process and requiring the Senator in *Long v. Ansell* to answer the Court of Appeals for the District of Columbia, said in pertinent part:

> "While the published articles were in part reproductions of the speech, the offense consists not in what was said in the Senate, but in the publication and circularizing of the libellous documents" 63 F. 2d at page 389.

CONCLUSION.

The power which the United States Court of Appeals has arrogated to District Judges by its decision in this case is the unfettered and relentless power to strike down anyone, anywhere and at anytime perforce the unfettered utterance of libels. No Congressman or Senator has the right to republish his libels or slanders outside the halls of Congress, yet any United States District Judge is now clothed with the unfettered power of a character assassination not only in West Publishing Company, but in any other journal or publication. This assumed power is supposed to be within the perimeter of the judicial administrative functions. But just as Judge Brancato sought to destroy an eminent trial lawyer, one James D. C. Murray, Judge Palmieri sought to destroy your petitioner's reputation. It was a wilful and malicious act, so alleged in the complaint, with not so much as a perfunctory denial interposed by Judge Palmieri. Once before Judge Palmieri had given the opinion to another publisher (Callaghan & Co.) with the offending language omitted. Is there no power in the courts to protect the innocent from the serpent's fangs of judicial libel of federal Judges?. The answer, it is respectfully submitted, must come from this Honorable Court.

Wherefore, petitioner prays that a writ of certiorari be granted and that the judgment below be reviewed by this Court.

Respectfully submitted,

GUSTAVE B. GARFIELD,
Attorney for Petitioner *pro se*.

APPENDIX.

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

No. 65—September Term, 1961.

(Argued November 8, 1961. Decided January 5, 1962.)

Docket No. 27047.

GUSTAVE B. GARFIELD,

Plaintiff-Appellant,

v.

EDMUND PALMIERI,

Defendant-Appellee.

Before:

Lumbard, Chief Judge.
Medina and Waterman, Circuit Judges.

Appellant seeks reversal of decision below, United States District Court for the Southern District of New York, Bryan, *J.*, granting summary judgment in favor of U. S. Judge Palmieri in action brought against the Judge for libel. Affirmed.

Gustave B. Garfield, New York City, *pro se.*

Robert M. Morgenthau, United States Attorney, Southern District of New York (Lola S. Lea, David Kingsberg, Asst. United States Attorneys, of counsel), *for Defendant-Appellee.*

PER CURIAM:

The plaintiff, an attorney, complained against the defendant, a Judge of the United States Court for the Southern District of New York, for an alleged libel and seeks money damages of a quarter-million dollars. "The complaint stemmed from a ruling made in open court during the argument of a motion, as the result of an exchange between counsel concerning the meaning of a statement in prior opinion of this Court. See *Fleischer v. Phillips*, 2 Cir. 1959, 264 F. 2d 515, 518." Suit was initiated in the Supreme Court of the State of New York and the case was removed, pursuant to 28 U.S.C. §1442, to the United States District Court for the Southern District of New York, where a motion was made to dismiss the complaint under Rule 12(b)(6) Fed. R. Civ. Proc. The motion was made upon affidavit to which exhibits outside of the pleadings were attached going to the merits of the facts involved in the action. Plaintiff, opposing this motion for dismissal, pointed out that the filing of the supporting affidavit caused the purported motion under Rule 12(b)(6) to be, instead, a motion for summary judgment under Rule 56, Fed. R. Civ. Proc., filed an affidavit of his own on the merits and prayed that defendant's motion be denied.

The court below treated the defendant's motion to dismiss as a motion for summary judgment and, after discussing the issues before him in an lengthly and perceptive opinion, reported at 193 F. Supp. 137, granted the motion.

The facts upon which this litigation has been superimposed are set forth in Judge Bryan's reported opinion. The claim urged below that New York law as set forth in the decision of the New York Court of Appeals in *Murray v. Brancato*, 290 N. Y. 52, 48 N. E. 2d 257, 146 A.L.R. 906, is determinative continues to be advanced

by appellant on appeal. We find *Murray v. Bruccato* inapplicable. We concur with the judge below that federal law governs, and that under federal law a federal judge is protected by an absolute privilege against civil liability for statements made by him in an opinion written by him. We also hold, with the judge below, that Judge Palmieri's transmission to West Publishing Company, in compliance with West's request, of a copy of his written opinion previously filed in the office of the Clerk of his Court was within the perimeter marking the outlines of the absolute privilege of federal judges against civil liability, an immunity recognized for years as necessary in order that federal judges may act fearlessly in performing their vital responsibilities that include duties in the administration of justice as well as in the deciding of cases. Bar and Bench alike rely upon the West Reporter volumes as sources in which to find the decisions of the U. S. Courts of Appeals and of the U. S. District Courts; and we take judicial notice that an opinion of a federal circuit or district judge is considered "not reported" until it appears in Federal Reporter or Federal Supplement. Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 806

GUSTAVE B. GARFIELD, PETITIONER

v.

EDMUND PALMIERI, UNITED STATES DISTRICT JUDGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (C.A. App. 16a–22a)[1] is reported at 193 F. Supp. 137. The opinion of the Court of Appeals (Pet. App. 21–23) is reported at 297 F. 2d 526.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1962. The petition for a writ of certiorari was filed on March 21, 1962. The jurisdiction

[1] "Citations to "C.A. App." refer to the Appendix to Appellant's Brief in the court below, a copy of which is on file with the Clerk of this Court.

of this Court is invoked under 28 U.S.C. 2101(c), but should have been invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal district judge may be subjected to a civil action for libel based upon his transmission of a copy of an opinion containing an allegedly defamatory statement for publication in the Federal Supplement.

STATEMENT

This is an action for libel, brought by petitioner in the Supreme Court of the State of New York against respondent, a United States District Judge for the Southern District of New York. The gravamen of the complaint was that respondent, "acting unofficially and privately in his individual capacity, and when no matter was then *sub judice* before him, maliciously and with actual malice and with intent to permanently degrade, and injure the plaintiff in the practice of his profession and to bring shame upon plaintiff in his said profession, published, and advised, induced, procured, and aided and abetted in the publication" by the West Publishing Company in the Federal Supplement of an opinion of respondent containing a "false and defamatory statement" concerning petitioner (C.A. App. 31a). The suit was removed to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. 1442 (Pet. App. 22).

The circumstances giving rise to the charge of defamation were as follows. Petitioner was attorney for the plaintiff in a civil antitrust suit (*Fleischer v. A.A.P., Inc.*) being tried before respondent. Dur-

ing oral argument, counsel for one of the defendants stated that the Court of Appeals for the Second Circuit had "rebuked" petitioner in an opinion rendered on an earlier appeal in the case, when it had said that certain statements made on behalf of petitioner's client were "unjustified and unworthy." *Fleischer* v. *Phillips*, 264 F. 2d 515, 518, certiorari denied, 359 U.S. 1002. When petitioner objected, stating that the appellate court's remark had been directed to petitioner's client and not petitioner, respondent stated his belief that it was petitioner himself who had been rebuked.

Petitioner then submitted an application for respondent's disqualification from further consideration of the merits of the case before him; respondent indicated orally his intention to deny this application. Subsequently, respondent filed an opinion dismissing plaintiff's cause of action as being barred by the statute of limitations. In this opinion, respondent also dealt with the application for his disqualification. After setting forth the circumstances leading up to the application, including the fact that he had stated his "belief that counsel [*i.e.*, petitioner] had been rebuked" by the court of appeals, respondent denied the application for disqualification, stating his reasons.

Approximately seven months after respondent's written opinion had been filed as a part of the official record in the *Fleischer* case, the West Publishing Company wrote respondent and informed him that an opinion by another judge which it was preparing for publication had referred to his as-yet unreported opinion in the *Fleischer* case (C.A. App. 9a). West requested a copy of respondent's opinion for publication

in the Federal Supplement, indicating that it wished to be able to give a definite volume and page reference for respondent's opinion in the publication of the other opinion. Respondent complied with this request, and his opinion was subsequently reported at 180 F. Supp. 717. It is this transmission for publication, and this publication of the statement in respondent's opinion that he believed petitioner had been rebuked by the court of appeals, 180 F. Supp. at 720, on which the present suit is based.

Prior to instituting the present suit, petitioner brought an action in the United States District Court for the Eastern District of New York in which he sought to have the allegedly defamatory portions of respondent's opinion expunged from the records of the United States District Court for the Southern District of New York. The complaint was dismissed by the district court on the grounds that respondent had jurisdiction to pass on the motion to disqualify himself and that federal judges are absolutely immune from civil actions arising out of their judicial acts. *Garfield* v. *Palmieri*, 193 F. Supp. 582. The court of appeals affirmed, 290 F. 2d 821, and this Court denied certiorari, 368 U.S. 827.

While the suit to expunge the allegedly defamatory material from the official record was pending before the court of appeals, petitioner instituted the present suit for libel. Petitioner did not contend that the writing and filing of the opinion as a part of the court's official records constituted actionable libel. Rather, he asserted that the "republication" of this opinion in the Federal Supplement is not within the

absolute judicial immunity from liability, because the "republication" in the West reporter system is not an official function of a federal judge. In support of this contention, petitioner relied primarily on the decision of the New York Court of Appeals in *Murray* v. *Brancato*, 290 N.Y. 52, 48 N.E. 2d 257.

The district court, while noting that respondent "stoutly maintain[s] that nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade" petitioner (C.A. App. 14a), granted respondent's motion for summary judgment on the ground that respondent, in sending the opinion to the West Publishing Company, "was acting well within the scope of his powers, duties and authority as a Federal Judge" and that, accordingly, he was "protected by an absolute privilege against civil liability for statements made in his opinion" (C.A. App. 17a–18a). The court of appeals affirmed *per curiam* (Pet. App. 21).

ARGUMENT

The decisions below are plainly correct. The basic issues involved—whether the respondent was acting in an official judicial capacity when he transmitted his opinion to the West Publishing Company and whether he is therefore protected by an absolute judicial immunity against civil suit for such transmission—have been fully canvassed and decided in respondent's favor by two courts, not only in this proceeding but in petitioner's suit to expunge the challenged language from the official records as well, *Garfield* v. *Palmieri*, 193 F. Supp. 582 (E.D.N.Y.), affirmed, 290 F. 2d 821

(C.A. 2), certiorari denied, 368 U.S. 827. There is no warrant for further review.

1. There can be no question but that respondent's claim of absolute immunity from liability in a civil suit arising from his actions as a federal officer must be determined by federal, and not state law.[2] As this Court held in *Howard* v. *Lyons*, 360 U.S. 593, 597, "[n]o subject could be one of more peculiarly federal concern, and it would deny the very considerations which give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States."

2. It is equally well-settled that "judges of courts of superior or general authority are absolutely privileged as respects civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with which those acts are alleged to have been performed * * *." *Barr* v. *Matteo*, 360 U.S. 564, 569. See also *Bradley* v.

[2] Even if New York law is applicable, *Murray* v. *Brancato*, *supra*, the decision of the New York Court of Appeals on which petitioner relies, is readily distinguishable from the present situation. The State of New York had established a Law Reporting Bureau which was responsible for selecting and publishing in the official state reporter the opinions of the lower courts. The defendant judge in the *Murray* case sent the allegedly defamatory opinions to two unofficial reporters and requested that they publish the opinions. Here, however, respondent transmitted his opinion to West at the request of West, in which request West indicated that the opinion was required because of its precedential value in another case. See pp. 3–4, *supra*. Moreover, as the district court below noted, it is the normal routine practice *for federal district judges to send* copies of their opinions to West for publication, 193 F. Supp. at 143. Compare *Bradford* v. *Pette*, 204 Misc. 308 (Sp. Term), appeal dismissed, 285 App. Div. 960, 139 N.Y.S. 2d 907.

Fisher, 13 Wall. 335; *Randall* v. *Brigham*, 7 Wall. 523; *Alzua* v. *Johnson*, 231 U.S. 106, 111; *Brietson* v. *Woodrough*, 164 F. 2d 107 (C.A. 8); *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2); *Meredith* v. *Van Oosterhoudt*, 286 F. 2d 216 (C.A. 8), certiorari denied, 365 U.S. 835; *Sauber* v. *Gliedman*, 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906; *Martin* v. *Wyzanski*, 191 F. Supp. 931 (D. Mass.). This Court has regarded this judicial privilege as a full "exemption from civil action," designed to prevent all need for judges to vindicate their official acts in private litigation, to the end that their independence of judgment will not be influenced by personal considerations. See *Randall* v. *Brigham*, *supra*, 7 Wall. at 536.

The policy that a "judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself," *Bradley* v. *Fisher*, *supra*, 13 Wall. at 347, is fully applicable to the present case. For if a federal judge is subject to civil suits because he has permitted one of his judicial opinions to be reported nationally, then his freedom to express his judgments and to discharge his duties in deciding cases may be seriously curtailed.

3. Nor can it be seriously disputed that respondent's compliance with the West Publishing Company's request that he transmit a copy of his opinion for publication was a judicial function essential to the orderly administration of justice and consequently *within the* absolute judicial immunity from liability. As Judge Bryan well stated, 193 F. Supp. at 143:

> There are no official published reports of the opinions of the federal district courts. The Federal Supplement published by West, as a part of its reporter system, furnishes the only comprehensive compilation of such opinions and is recognized as authoritative by the courts and the profession. In a system of law based on stare decisis it is not enough that opinions of the court be available only to litigants and their counsel. It is essential that such opinions be readily accessible to the legal profession generally and to the courts for purposes of research, citation and general information as to the state and development of the law, as well as to others who may wish to refer to them. The sound and efficient administration of federal justice requires that such publication in a reporter system of the nature of the Federal Supplement be unfettered. This is in the interest not only of litigants, the legal profession and the courts themselves, but of the public generally. Such unfettered publication is a matter of public policy and outweighs and overrides any injury to an individual which might result from the application of such a rule.

Similarly, the court of appeals observed that the "vital responsibilities" of federal judges "include duties in the administration of justice as well as in the deciding of cases," a necessary part of which must be cooperation in the reporting of their opinions in the sources upon which "Bar and Bench alike rely," 297 F. 2d at 527.[3]

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[3] There is another and independent reason why this suit must fail. When respondent filed his opinion with the clerk of the court, it became a part of the official record of the

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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WILLIAM H. ORRICK, JR.,
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Attorneys.

APRIL 1962.

Fleischer case and a public record. Thereafter, the opinion was freely available to any member of the public, including the West Publishing Company, who might wish to copy it or to obtain a copy from the clerk.

U.S. GOVERNMENT PRINTING OFFICE 1962

Office Supreme Court, U.S.
FILED
APR 25 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 806.

GUSTAVE B. GARFIELD,

Petitioner,

v.

EDMUND PALMIERI,

Respondent.

REPLY BRIEF OF THE PETITIONER.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1962

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In the

Supreme Court of the United States

October Term, 1961.

No. 806.

Gustave B. Garfield,

Petitioner,

v.

Edmund Palmieri,

Respondent.

REPLY BRIEF OF PETITIONER.

Corrections to the Respondent's Statement of Facts.

At page 3 of his brief, the respondent quotes the District Court as saying that "*respondent 'stoutly maintains' that nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade.*"

There is no question but that District Judge Bryan wrote the quoted words, but the fact is that never at any time in any affidavit submitted by respondent Palmieri, nor by anyone on his behalf, did he faintly let alone "stoutly" maintain that "nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade." The fact is that respondent Palmieri personally interposed no affidavits, at all, in support of his motion to dismiss the complaint. Never did he say that he was not motivated by malice or an intent to injure or degrade in any paper filed in this action. That

allegation in the complaint stands undenied and conceded by the motion to dismiss.

If, as it is claimed, respondent Palmieri made any statement in which he "stoutly" maintained that nothing in the opinion was false or untrue or was written or published with any malice or intent to injure, it must have *been made* outside of the record, because he never did so on the record.

The sole affidavit submitted in support of the motion to dismiss was made by one Stephen Kurzman, an Assistant United States Attorney, who annexed a copy of a letter from the West Publishing Company dated February 8, 1960, written seven months after the filing and publication of the opinion in the office of the Clerk of the District Court, on July 15, 1960, in which West requested Judge Palmieri to send it a copy of "your unreported opinion in the above case together with the names and addresses of the attorneys for the respective parties and the filing date with a view to publication in the Federal Supplement so that a definite volume and page reference may be given" (Exhibit C, page 9a-Appendix).

Mr. Kurzman never offered one word to prove the truth of the libelous statements made by respondent Palmieri, nor did he at any time even remotely suggest that the libelous statements were uttered without malice and without an intent to injure and degrade petitioner. He relied upon absolute privilege as a defense for republication in West seven months after the initial publication.

In the answering affidavit of the petitioner it is asserted: "only the vicious malice of this defendant dictated the publication in Federal Supplement when this defendant had personal knowledge that the plaintiff had from the outset sought to have a review of the findings of this defendant that plaintiff had been rebuked" (Ap.

29a). This assertion is not denied by the respondent nor by anyone on his behalf.

Respondent Palmieri while acting as a district judge did everything in his power to prevent a review on appeal of his libelous opinion, filed in the office of the Clerk of the District Court on July 15, 1969, by refusing to make a final order directing the Clerk to enter final judgment dismissing the second cause of action based upon anti-trust violations. Had this been done it would have permitted a review by the parties litigant of the scandalous opinion insofar as it concerned the petitioner's application on his client's behalf to have Judge Palmieri disqualify himself. In consequence, to this day, no review has been possible. There is no denial of malice, an intent to injure, nor is there the slightest proof offered in support of the statement of Judge Bryan that respondent "stoutly maintains that nothing in the opinion is false or untrue or was written or published with any malice or intent to injure or degrade."

REPLY TO RESPONDENT'S ARGUMENT.

(1) The question of whether the respondent was acting in an official judicial capacity in transmitting his opinion to West Publishing Company (a private profit-making corporation), has never been answered by any court prior to the within suit, despite the contrary assertion of the respondent at page 5 of his brief that the matter was fully canvassed and decided in respondent's favor in *Garfield v. Palmieri*, 193 F. Supp. 582. That suit decided that an action did not lie under the Civil Rights provisions of the U. S. Code and the Fifth Amendment to the U. S. Constitution to redress the wrong done by the filing in the office of the Clerk of the District Court of a libelous opinion, by having it expunged. Republica-

tion in West was not even known to petitioner at the time he filed his suit nor was it involved in the complaint or decision.

In dismissing the complaint in the first cause of action Judge Bartels said:

> "A complaint so drawn as to seek a recovery for an invasion of the plaintiff's constitutional rights vests jurisdiction in this Court and enables it to decide whether or not the claim has any merit. * * * The principle exempting judges of courts of record from prosecution or suits for any *illegal* act performed during the course of a judicial proceeding over which he had jurisdiction has deep roots in the common-law. Its history has been traced in the much cited and leading case of *Bradley v. Fisher*, 80 U. S. 335 (13 Wall.)."

(2) The complaint in this action alleges that the "*defendant acting unofficially and privately in his individual capacity, and when no matter was then sub judice before him*, maliciously and with actual malice and with intent to permanently degrade and injure the plaintiff in the practice of his profession and to bring shame upon the plaintiff in his said profession, published, and advised, induced, procured, and aided and abetted in the publication in 1960 * * * of Volume 180 of Federal Supplement * * * of a false and defamatory statement of and concerning plaintiff (Ap. p. 31a).

(3) Since the statement of facts set forth in the complaint is to be accepted as true, then it matters little whether we accept New York Law or Federal Law because in either case the judicial officer is not protected for libels committed by him outside of his office no more than a Senator or Congressman is protected for libels republished from the Congressional Record by private agencies. *Murray v. Brancato* made it quite clear that under New York Law a judge is fully protected for

libels uttered while he sits in the seat of judgment. It was because Judge Brancato sent his opinion to the New York Law Journal for *Front Page* publication and to the West Publishing Company for publication in New York Supplement that he was held to answer for the libel against James D. C. Murray, a prominent trial lawyer. West Publishing Company is the publisher of Federal Supplement as it is of New York Supplement. In consequence the same basic situation applies in both federal or state publications in West.

(4) It was no more within the outer perimeter of Judge Palmieri's judicial function to send his opinion to West than it was within the outer perimeter of the judicial function of Judge Brancato to send his opinion to West. These judges simply assume (and we believe incorrectly) that they have the right to assassinate the character of lawyers who have the courage to stand up and fight for their clients' rights without giving affront to the judge, without a display of disrespect or discourtesy. If judges simply out of vanity, or to satisfy a venomous inclination or out of spite have the right to send their libelous opinions to West, then they have the same right to send it to the New York Times and to every newspaper in the country. Just as it is the duty of a judge to be fearless, so too it is the duty of a lawyer not to be cowed by judicial tyranny and by the threat of judicial character assassination should he dare stand up in court to protect his client's rights. The judicial immunity thus created below is judicial invasion of the legislative function, investing the federal judge with the power of destruction of those who incur his disfavor. The judge sitting in Foley Square in the State Court has no such judicial immunity for extrajudicial libels.

(5) We seriously dispute therefore that respondent's compliance with the request of West that he transmit the

copy of his opinion to West was the exercise of a judicial function, essential to the orderly administration of justice. There are hundreds of thousands of opinions and memoranda filed each year in the offices of the Clerks of the United States Courts, only a handful of which find their way into print. If judges could be called upon to serve a private agency such as West to send them copies of their opinions then the judicial function could be said to be at the beck and call of every private publication. If the judge refuses the request of West is he remiss in his duties? We lawyers who wish a copy of an opinion have to copy it in longhand or pay fifty cents per page for its copying by the clerk. Nor will any of the judges of the District Court supply us with copies of their decisions or opinions. They rightly state that their function ends when their opinions are filed in court.

It is vanity and vanity alone that impels a District judge to so readily comply with the request of West for a copy of his opinion. Since when has the satisfaction of the judicial vanity been within the outer perimeter of judicial function? If West or anyone else wishes to have a copy of an opinion it may send its representatives to court to analyze and copy opinions but it may not be said that if a judge voluntarily complies with a request that a copy of an opinion be sent to West seven months after the matter has been decided that such act is within the outer perimeter of the judicial function, no more than it can be said that if the judge refuses to comply that he is remiss in his duty.

CONCLUSION.

For the foregoing reasons and the reasons stated in the petition the application for a writ should be granted.

April, 1962.

GUSTAVE B. GARFIELD,
Attorney for Petitioner *pro se*.